No. 87-526

In The
Supreme Court of the United States
October Term, 1987

BOBBY FELDER,

Petitioner,

v.

DUANE CASEY, *et al.*,

Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE WISCONSIN SUPREME COURT

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STATEMENT OF THE CASE

Respondents accept Petitioner's statement of the case, as supplemented by the following information concerning the decision by the Wisconsin Supreme Court. Respondents further accept the Appendix of Petitioner, and will make reference thereto in the same manner employed by Petitioner.

In its decision, the Wisconsin Supreme Court carefully analyzed and obviously replied heavily upon the decisions of two other state appellate courts, from Indiana and New York, wherein a state notice of claim statute was held applicable to a federal cause of action brought in state court. In discussing *Clark v. Indiana Dept. of Public Welfare*, 478 N.E.2d 699 (Ind. Ct. App. 1985), *cert. denied*, 106 S. Ct. 2893 (1986), the Wisconsin Supreme Court accepted the *Clark* court's position that such a claim statute

> is a procedural precedent which must be fulfilled before filing suit in state court ... Because it is a procedural precondition to sue, it overrides the procedural framework of Sec. 1983 when the litigant chooses a state court forum. 478 N.E.2d at 702 (citations omitted). [A-10]

Similarly, the Wisconsin Supreme Court quoted the New York decision, *Mills v. County of Monroe*, 59 N.Y.2d 307, 464 N.Y.S.2d 709, 451 N.E.2d 456, *cert. denied*, 464 U.S. 1018 (1983), wherein the New York Court of Appeals stated:

> Although Congress established no timeliness or notice requirements to apply to section 1981 actions brought in Federal court, these courts have been instructed that, when interstices or voids occur in the Federal

law, they should borrow the applicable State rule of law so long as it is not 'inconsistent with the Constitution and laws of the United States' . . . . This court . . . does not find that the State's notice requirements are antithetical to the policy underlying the civil rights laws. 59 N.Y.2d at 309-310, 451 N.E.2d at 457 (quoting 42 U.S.C. Sec. 1988; case citations omitted). [A-10]

The Wisconsin Supreme Court also discussed its prior decisions on the beneficial purposes served by Sec. 893.80, Stats., referring to *Patterman v. Whitewater*, 32 Wis 2d 350, 145 N.W.2d 705 (1966) and *Harte v. Eagle River*, 45 Wis. 2d 513, 173 N.W.2d 683 (1970). The Court stated:

> It has been said that the primary purpose of a notice of claim statute is to give the municipality the opportunity to attempt to compromise the claim and effect settlement before the parties are forced to proceed with a lengthy or costly lawsuit. *Patterman*, 32 Wis. 2d at 357. [A-9]

The Wisconsin Supreme Court went on to point out that

> The remedial and deterrent purposes underlying Sec. 1983 actions are not frustrated simply because a state court litigant must abide by state court procedures. The notice of claim statute does not operate to limit the amount that a plaintiff might recover for a violation of his or her civil rights. [footnote omitted] Nor does the notice requirement operate to preclude a plaintiff's possibility for recovery . . . . [A-12]

Finally, it should be noted that, having concluded that Sec. 893.80, Stats., is a condition precedent to the bringing of a federal civil rights cause of action in a Wisconsin state court, the Wisconsin Supreme Court then concentrated its attention upon whether Petitioner Felder had complied with the notice of injury portion of the statute, as set forth in Sec. 893.80 (1)(a), Stats., and concluded that Felder had not.

Accordingly, the court was not called upon to decide whether Felder had complied with the second portion of that statute, i.e., Sec. 893.80 (1)(b), Stats., with respect to the filing of an "itemized statement of the relief sought." The record in this case is completely devoid of any such filing.

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REASONS FOR DENYING THE WRIT

I. THE EXISTENCE OF A SPLIT OF AUTHORITY AMONG STATE COURTS OF LAST RESORT DOES NOT FORM THE BASIS FOR THE GRANTING OF THE WRIT

The narrow issue decided by the Wisconsin Supreme Court in the instant action was whether, in balancing the interests of all concerned, the procedural aspects of Sec. 893.80 (1), Stats., should apply as a condition precedent to bringing a federal cause of action in a Wisconsin state court in the same manner as it applies to any other cause of action.

That decision is founded in the hornbook principle that "While the Constitution vests in Congress 'the power to prescribe the basic procedural scheme under which claims may be heard in federal courts,' " *Kramer v. Horton*, 128 Wis. 2d 404, 417, 383 N.W.2d 54 (1986), quoting *Patsy v. Board of Regents*, 457 U.S. 496 at 501 (1982), the Tenth Amendment to the Constitution of the United States "re-

serves to the state legislatures and state courts the power to prescribe the procedural scheme under which claims may be heard in state court." *Kramer v. Horton*, 128 Wis. 2d at 417.

The Tenth Amendment to the Constitution of the United States provides that "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

As the Wisconsin Supreme Court pointed out in its decision, while Wisconsin's notice of claim statute was limited, in previous versions, only to tort actions, the statute was amended (and thereby expanded) by passage by the Wisconsin legislature of Chapter 285, Laws of 1977, to apply to *any* cause of action [A-9].

Accordingly, that act represents a conscious decision on the part of the Wisconsin legislature to require, as a matter of sound public policy and judicial economy, compliance with the notice of claim provisions of Sec. 893.80 (1), Stats., as a condition precedent to the bringing of any action in *state* court.

Given the judicially recognized purpose of the statute, i.e., to "afford the municipality an opportunity to compromise the claim and settle it without a costly and expensive lawsuit," *Gutter v. Seamandel*, 103 Wis. 2d 1, 9, 308 N.W.2d 403 (1981), such a requirement can hardly be said to be inconsistent with the Constitution and the laws of the United States. Notice to the municipality of an alleged injury, coupled with a demand for relief which provides the municipality with an opportunity to settle the claim prior to litigation, is clearly not, as the New York

Court of Appeals agreed, "antithetical to the policy underlying the civil rights laws." *Mills v. County of Monroe*, 451 N.E.2d at 457. Indeed, providing such a procedural framework may well foster early resolution of such claims, certainly a laudable result beneficial to both the claimant and the municipality involved.

As Petitioner correctly points out, there has been a split among state courts of last resort on the issue of whether a state notice of claim statute should apply to federal civil rights cases brought in state court. California, in *Williams v. Horvath*, 16 Cal.3d 834, 548 P.2d 1125, 129 Cal. Rptr. 453 (1976), Idaho, in *Overman v. Klein*, 103 Idaho 795, 654 P.2d 888 (1982), and Oklahoma, in *Wilborn v. City of Tulsa*, 721 P.2d 803 (Okla. 1986), have analyzed their state statutes and concluded that such statutes are inapplicable to federal actions brought in their state courts.

On the other hand, two states, in addition to Wisconsin, have now held, based upon their own analysis of their state notice of claim statutes, the policies behind such statutes, the impact of requiring compliance with such statutes, and the applicable caselaw, that such statutes are not violative of the Constitution or the laws of the United States.

As indicated earlier, the New York Court of Appeals upheld the applicability of a notice of claim requirement to a state court action under 42 U.S.C. Sec. 1981 in *Mills v. County of Monroe*, 59 N.Y.2d 307, 451 N.E.2d 456, 464 N.Y.S.2d 486, *cert. denied*, 464 U.S. 1018 (1983). That same court also applied the notice of claim requirement to a state court Sec. 1983 action in *423 South Salina Street*

v. City of Syracuse, 68 N.Y.2d 474, 503 N.E.2d 63, 410 N.Y.S.2d 507 (1986), *appeal dismissed*, 107 S.Ct. 1880 (1987).

More recently, in an extremely well reasoned opinion, the Indiana Court of Appeals upheld the applicability of the Indiana state tort claim act notice provision in *Clark v. Indiana Dept. of Public Welfare*, 478 N.E.2d 699 (Ind. Ct. App. 1985), *cert. denied*, 106 S.Ct. 2893 (1986).

Clearly, the procedural requirement of each such notice of claim statute, and the impact of such requirement on the viability of the Sec. 1983 claim in the particular state, is unique to that state. In that respect, this Court should note that while compliance of the notice of claim statute, Sec. 893.80 (1), Stats., is, by virtue of the Wisconsin Supreme Court's decision in the instant action, a condition precedent to state court Sec. 1983 actions in Wisconsin, the Wisconsin Supreme Court has also opined that the statutory recovery limit set forth in Sec. 893.80 (3), Stats., ($25,000, raised to $50,000 by ch. 63, Laws of 1981) is not applicable to Sec. 1983 actions in Wisconsin state courts, since "the purpose behind Sec. 1983 would be . . . defeated if deprivation of constitutional rights was not fully compensated because of a state statutory recovery ceiling." *Thompson v. Village of Hales Corners*, 115 Wis. 2d 289, 298, 340 N.W.2d 704 (1983).

In analyzing the issue, the *Thompson* court stated:

> State law cannot be used where its application would frustrate federal policies. The policy behind sec. 1983 civil rights actions is one of compensation for actual injury. Insofar as the state recovery ceiling prevents realization of that policy, it must give way. We conclude that the limitation on municipal liability set forth in sec. 893.80, Stats. has no application to a damage award under 42 U.S.C. sec. 1983.

The *Thompson* court also upheld the awarding of attorney's fees pursuant to 42 U.S.C. Sec. 1988 to a prevailing plaintiff in a Sec. 1983 action. *Thompson v. Village of Hales Corners*, 115 Wis.2d at 309.

Accordingly, it is apparent that the Wisconsin Supreme Court not only recognized the federal policy behind Sec. 1983, but has also concluded that the procedural notice of claim requirements of Sec. 893.80, Stats., do not frustrate that policy.

However, since each state's statutes on notice of claim varies, both in procedural requirements and impact on the aforementioned federal policy, the existence of a split in authority in state courts of last resort does not, *a priori*, result in the conclusion that the split must be reconciled. Rather, it merely serves to recognize the proposition that state appellate courts, rather than federal courts, are the best forums for interpretation of state statutes. While this Court may decide to review the decision of the Wisconsin Supreme Court in the case at bar on the issue of whether applicability of Wisconsin's notice of claim statute frustrates the policy behind Sec. 1983 actions, it should not do so merely because of the aforementioned split of authority.

II. THE WRIT SHOULD BE DENIED BECAUSE THE DECISION BELOW DOES NOT RAISE IMPORTANT ISSUES IMPLICATING ESTABLISHED PRINCIPLES OF FEDERALISM

Petitioner has cited a number of authorities for the proposition that a number of federal courts of appeal have

rejected the application of state notice of claim requirements to Sec. 1983 litigation (Petitioner's Brief at p. 14). However, the cited cases are irrelevant to the issue at bar, since they stand for the proposition, in general terms, that state notice of claim requirements are inapplicable to Sec. 1983 litigation in *federal* court. Respondents have not in the instant action suggested the contrary. The issue at bar is whether a state notice of claim requirement is applicable to Sec. 1983 litigation in *state* court.

In *Thompson v. Village of Hales Corners,* 115 Wis.2d 289, 296-297 (1983), the Wisconsin Supreme Court discussed the Supremacy Clause of the United States Constitution, stating:

> Article VI, clause 2 of the United States Constitution provides: "[T]his constitution, and the Laws of the United States which shall be made in pursuance thereof . . . shall be the supreme law of the land." The United States Supreme Court has interpreted the Supremacy Clause to require that "any state law, however clearly within a state's acknowledged power, which interferes with or is contrary to federal law, must yield." *Free v. Bland,* 369 U.S. 663, 444 (1962); *Gibbons v. Ogden,* 22 U.S. 1, 210-211 (1824). In considering the validity of a state act under the Supremacy Clause, the question is whether the challenged statute "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," *Perez v. Campbell,* 402 U.S. 637, 649 (1970) or results in "frustration and erosion of the congressional policy embodied in federal rights." *Ridgway v. Ridgway,* 454 U.S. 46, 54 (1981).

Given the many laudable benefits to both claimant and governmental entity which compliance with the notice of claim statute provides, including, without limitation, the opportunity to promptly compromise the claim in a non-adversarial setting, without the expense and inevitable delays which accompany litigation, it is difficult to conceive of how such a requirement of compliance "frustrates" federal policy, or would serve to force plaintiffs out of the state court system and into the federal courts.

This is particularly true because in Wisconsin, the statutory recovery limit and Sec. 1988 attorney's fees issues have already been resolved in plaintiff's favor. Accordingly, the kind of concern expressed by Justice Brennan on behalf of the majority in *Maine v. Thiboutot,* 448 U.S. 1, 11 n.12 (1980) that "[i]f fees were not available in state courts, federalism concerns would be raised because most plaintiffs would have no choice but to bring their complaints concerning state actions to federal courts" is not a legitimate argument.

There was no suggestion in the decision of the Wisconsin Supreme Court in the instant case, nor can there be, that the court was unwilling or unable to apply the substantive aspects of Sec. 1983 law to any such cases brought in the Wisconsin state court system. Indeed, the court's history proves the contrary.

Accordingly, this Court should not grant the Petitioner's writ because of some hypothetical suggestion that, in the future, the decision will encourage "the adoption by state courts of policies inhospitable to plaintiffs who prefer to litigate their Sec. 1983 claims in state courts." (Petitioner's Brief at p. 15).

III. THE WRIT SHOULD BE DENIED BECAUSE THE DECISION OF THE WISCONSIN SUPREME COURT DOES NOT CONFLICT WITH PRIOR DECISIONS OF THIS COURT REQUIRING STATE COURTS THAT ENTERTAIN FEDERALLY-CREATED ACTIONS, INCLUDING SEC. 1983 ACTIONS, TO APPLY THE ENTIRE FEDERAL CAUSE OF ACTION WITH ALL ITS REMEDIAL ATTRIBUTES

Petitioner's third argument in favor of granting the writ is based upon the false premise that the decision of the Wisconsin Supreme Court below fails to apply the entire federal cause of action (Sec. 1983) with all its remedial attributes. The fact that the Wisconsin Supreme Court described the state notice of claim requirement as procedural and that petitioner disagrees with that characterization does not render the requirement substantive, nor does it "limit access to state courts by litigants." (Petitioner's Brief at p. 19).

The Wisconsin Supreme Court has long recognized that state courts do have subject matter jurisdiction over claims based upon Sec. 1983. *Kurtz v. City of Waukesha*, 91 Wis.2d 103, 108, 280 N.W.2d 757 (1969), and that "[s]tate law cannot be used where its application would frustrate federal policies. The policy behind Sec. 1983 Civil Rights Actions is one of compensation for actual injury." *Thompson v. Village of Hales Corners*, 115 Wis. 2d 289, 304 (1983).

As pointed out earlier in Argument I, *infra*, this Court has stated that state procedural statutes should be utilized as long as they are "not inconsistent with the Constitution and Laws of the United States." *Robertson v. Wegman*, 436 U.S. 584, 588 (1978).

Also, the Wisconsin Supreme Court's characterization of Sec. 893.80(1), Stats., as procedural is not unique. In *Clark v. Indiana Dept. of Welfare*, 478 N.E.2d 699 (1985), a decision by the Court of Appeals of Indiana, First District, the court stated at p. 712:

> The ITCA [Indiana Tort Claims Act] notice provision is not a statute of limitation [citation omitted]. Rather, it is a procedural prerequisite which must be fulfilled before filing suit in state court [citation omitted]. Because it is a procedural precondition to sue, it overrides the procedural framework of Sec. 1983 when a litigant chooses a state court forum [citations omitted]. Despite the holding in *Bell* we find the 180 day notice of claim provision applies to Sec. 1983 actions brought in state court [citation omitted].

Not only was a petition for rehearing denied (July 10, 1985) in that case, but certiorari was denied by this Court, *Clark v. Indiana Dept. of Public Works*, 106 S.Ct. 2893 (1986).

Compliance with the requirement of Sec. 893.80(1), Stats., much like compliance with the filing and service requirements for initiation of a lawsuit in Wisconsin state courts, is a well-founded procedural rule which plaintiffs should be required to follow. Where followed, the doors to the courthouse swing open, and the substantive aspects of the federal cause of action under Sec. 1983, with its panoply of remedial attributes, is available to a plaintiff in the same way, and to the same extent, that they are available in federal court.

IV. THE WRIT SHOULD BE DENIED BECAUSE THE DECISION OF THE WISCONSIN SUPREME COURT IS NOT IN CONFLICT WITH PRINCIPLES DEVELOPED BY THIS COURT IN CONSTRUING SEC. 1983

Petitioner's final argument is based in part upon the conclusion that this Court, in deciding in *Patsy v. Board of Regents of the State of Florida*, 457 U.S. 496 (1982), that exhaustion of state administrative remedies should not be required as a prerequisite to bringing an action pursuant to Sec. 1983, was somehow doing so because to require such exhaustion prior to commencement of litigation would deny plaintiffs immediate access to judicial forums.

However, a more careful reading of the *Patsy* decision reveals that this Court engaged in a thorough analysis of Congressional intent on the exhaustion of administrative remedies issue, and after recognizing the obviously difficult questions concerning the design and scope of such an exhaustion requirement, concluded

> These and similar questions might be answered swiftly and surely by legislation, but would create costly, remedy-delaying, and court-burdening litigation if answered incrementally by the judiciary in the context of diverse constitutional claims relating to thousands of different state agencies.

***Patsy v. Board of Regents of the State of Florida*, 457 U.S. 496 at 514.**

Similarly, in the instant case, the Wisconsin Supreme Court looked to the intent of the Wisconsin legislature in passing the most recent amendment to Sec. 893.80(1), Stats., whereby the scope of the notice of claim requirement was expanded to all causes of action. Having easily discerned to intent of the legislature, the court merely enunciated it. Thereafter, having determined that requiring compliance with Sec. 893.80(1), Stats., would not frustrate the federal policy underlying Sec. 1983, the court was properly able to rule as it did.

With respect to Petitioner's statute of limitations argument, it should be noted that while the Wisconsin Supreme Court was asked in this case to determine which Wisconsin statute of limitations was applicable to Sec. 1983 actions [A-5], in the light of this Court's decision in *Wilson v. Garcia*, 471 U.S. 261 (1985), the court declined to do so, deciding the case on the notice of claim issue. Undoubtedly, the Wisconsin Supreme Court will be called upon, in some late case, to decide which statute of limitations will apply to all Sec. 1983 cases in Wisconsin. However, Sec. 893.80(1), Stats., is not a statute of limitations. It is a procedural notice of claim provision, one which any claimant should be able to comply with as easily as such claimant might be able to draft a Sec. 1983 pleading to file in court.

Petitioner appears to be arguing inconsistent positions, i.e., that a plaintiff should, on one hand, be allowed to immediately rush into state court with a Sec. 1983 action, and yet that the same plaintiff is unable to provide the municipality with the factual bases for his claim (notice of claim). Such a position defies logic.

This Court should recognize that Wisconsin's notice of claim requirement, as set forth in Sec. 893.80(1), Stats., is consistent with the principles developed by this Court in construing Sec. 1983, as discussed in this and earlier sections of this argument.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari to review the judgment and opinion of the Wisconsin Supreme Court should be denied.

Respectfully submitted,

October, 1987

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